IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

HUNTON ANDREWS KURTH LLP, **Plaintiff,** **v.** **U.S. FOOD AND DRUG ADMINISTRATION,** **Defendant.**	**Civil Action No.:** 3:19cv399

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Hunton Andrews Kurth LLP ("Hunton") brings this action against the United States Food and Drug Administration ("FDA") to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA" or the "Act"). Hunton alleges as follows:

Parties

1. Hunton is a limited liability partnership and law firm with a principal place of business in Richmond, Virginia.

2. The FDA is a department of the executive branch of the U.S. government and an "agency" within the meaning of that term in 5 U.S.C. § 552(f)(1) in control of "record[s]" within the meaning of that term in 5 U.S.C. § 552(f)(2) that have been requested by Hunton.

Jurisdiction and Venue

3. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. §§ 701–706, and 28 U.S.C. § 1331.

4. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1).

5. Assignment to the Richmond Division is proper under Local Civil Rule 3.

Statutory Framework

6. The Act requires federal governmental agencies to make records, subject to certain statutory exemptions, promptly available to any person that requests them in accordance with published rules. 5 U.S.C. § 552(a)(3)(A).

7. Under the Act, agency records consist of materials either created or obtained by the agency that are in control of the agency at the time the FOIA request is made. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

8. Within 20 business days of receiving a request for records, an agency must make a determination whether to comply with the request and promptly communicate it to the person making the request—i.e., the agency must indicate "the scope of the documents it will produce and any exemptions it will claim with respect to withheld documents." *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n.*, 711 F.3d 180, 182–83 (D.C. Cir. 2013); *see also* 5 U.S.C. § 552(a)(6)(A)(i) (establishing requirement). This requirement applies to the FDA. 20 CFR § 20.41(b).

9. A person making a request for records "shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions …." 5 U.S.C. § 552(a)(6)(C)(i).

10. The Court may assess against the United States reasonable attorney fees and other litigation costs under 5 U.S.C. § 552(a)(4)(e)(i).

Background

I. The First FOIA Request

11. On December 20, 2018, Hunton submitted to the FDA, under the Act, Hunton's first request for selected records "relating to certain fluorochemicals used in the manufacture of paper

food packaging ….” Dec. 20, 2018 Ltr.to FDA (Attached as Exhibit 1).

12. Hunton subsequently discussed this request with the FDA, narrowed the request, and learned that Hunton would be required to provide a prepayment of approximately $3,500.00 to have the request processed. Hunton requested information on how to make that payment. Feb. 26, 2019 Email to M. Swain (Attached as Exhibit 2).

13. On April 4, 2019, Hunton learned that its first FOIA request had been cancelled by the FDA, purportedly because the FDA had sent an invoice for the prepayment and Hunton had failed to timely make the prepayment. April 4, 2019 Email from M. Swain (Attached as Exhibit 3).

II. The Second FOIA Request

14. That same day, Hunton submitted to the FDA, and the FDA received, a second FOIA records request. FOIA Request Confirmation; Apr. 4, 2019 Email from noreply@fda.gov (Attached as Exhibit 4).

15. Hunton informed the FDA that it intended the second request “to be consistent with [the first request] as narrowed ….” Apr. 4, 2019 Ltr. to FDA (attached as Exhibit 5) at 1.

16. In addition, Hunton submitted to the FDA a prepayment of $3,410.75 for the second request, following the instructions in the letter the FDA purportedly had sent regarding the first FOIA request. *Id.* at 3–4; Apr. 5, 2019 Ltr. To FDA (attached as Exhibit 6).

17. The FDA cashed the check for the prepayment on April 9, 2019. Cancelled check (attached as Exhibit 7)

18. On April 10, 2019, the FDA sent Hunton an email acknowledging receipt of the second FOIA request and assigning it the identifier 2019-3073. Apr. 10, 2019 Email from FDA_FOI@fda.gov (attached as Exhibit 8).

19. On May 1, 2019, the FDA informed Hunton that the FDA had received the prepayment

and requested the identifier for the related FOIA request. May 1, 2019 Email from M. Swain, attaching the Feb. 20, 2019 Ltr. from Exhibit 3 (Exhibit 9 at 1).

20. That same day, Hunton provided the requested information. *Id.*, attaching the Apr. 5, 2019 Ltr. from Exhibit 6, the Apr. 4, 2019 FOIA Request Confirmation from Exhibit 4, and the Apr. 10 FDA Receipt of FOI Request from Exhibit 8.

21. Federal regulations require the FDA Division of Freedom of Information to include for each request for records in a public log the following information: "the date received, the name of the person making the request, the nature of the record requested, the action taken on the request, the date of determination letter sent pursuant to 20.41(b), and the date(s) any records are subsequently furnished." 21 CFR § 20.40(c).

22. The only information available in the FDA FOIA Log for Request # 2019-3073, however, is the "Control #," "From," and "Subject." Selected pages from FDA FOIA Log – April 2019, downloaded from https://www.fda.gov/regulatory-information/freedom-information/fda-foia-logs on May 28, 2019 (Attached as Exhibit 10).

23. Although the FDA has not formally disclosed the date the FDA received Hunton's second FOIA request, that date was more than 20 working days ago.

24. In particular, more than 20 working days have passed since the FDA sent Hunton an email acknowledging receipt of Hunton's second FOIA request on April 10, 2019.

25. To date, despite FDA's receipt of the second FOIA request and FDA's negotiation of the check for the prepayment, Hunton has not received from the FDA with respect to Hunton's second FOIA request a determination letter, a request for clarification, any of the requested records, or notification of (or a request for) an extension.

Claim for Relief:

FOIA Violation for
Failure to Provide a Determination within 20 Business Days

26. Hunton re-alleges and incorporates paragraphs 1–20 above, inclusive.

27. The FDA has violated its legal duty under 5 U.S.C. § 552(a)(6)(A)(i) to determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of Hunton's second FOIA request whether to comply with the request and immediately to notify Hunton of the determination and the reasons therefor.

28. The FDA's failure to meet these statutory requirements prevents Hunton from knowing what records it will receive and potentially challenging an FDA decision to withhold certain records.

29. The FDA's violation of the Act has harmed and will continue to harm Hunton until the FDA complies with the Act.

FOIA Violation for
Failure to Make Records Promptly Available

30. Hunton re-alleges and incorporates paragraphs 1–20 above, inclusive.

31. The FDA has violated its legal duty under 5 U.S.C. § 552(a)(3)(A) to make promptly available to Hunton the records requested by Hunton.

32. The FDA's failure to meet this statutory requirement frustrates the purpose of the Act by withholding from Hunton information to which it is legally entitled.

33. The FDA's violation of the Act has harmed and will continue to harm Hunton until the FDA complies with the Act.

Prayer for Relief:

Hunton respectfully requests that this Court grant it the following relief:

A. Declare unlawful under the Act the FDA's failure timely to respond to Hunton's April 4,

2019 FOIA request.

B. Declare unlawful under the Act the FDA's failure timely to make promptly available to Hunton the records requested in Hunton's April 4, 2019 FOIA request.

C. Order the FDA immediately to respond to Hunton's April 4, 2019 FOIA request.

D. Order the FDA immediately to provide Hunton with all records responsive to Hunton's April 4, 2019 FOIA request.

E. Order the FDA that, if it makes a determination that any records or portions of records are exempt from disclosure, it must provide a reasonable basis for its exemptions in satisfaction of the requirements identified in *Vaughn v. Rose*, 484 F.2d 820 (D.C. Cir. 1973).

F. Award Hunton the cost of this action, including reasonable attorney fees.

G. Grant such other relief as the Court deems just and proper.

Dated: May 28, 2019

Respectfully submitted,

HUNTON ANDREWS KURTH LLP

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